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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 1315

WILLIAM WARDEN DUNCAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS ROCA BEAUCHAMP & LINTON

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 6, 1968. A petition for rehearing dated March 4, 1968, was duly filed and denied on March 14, 1968.

The unreported opinion of the Court of Appeals is attached as Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit from which this petition is taken was entered on February 6, 1968. A petition for rehearing was timely filed; it was denied on March 14, 1968 (Appendix B). This court has jurisdiction under 28 U.S.C. Sec. 1254(1). The matter in the Court of Appeals was an appeal from a judgment and sentence entered thereon against the petitioner by the Federal District Court in and for the State of Arizona following the jury's verdict finding the defendant guilty of receiving and concealing two stolen motor vehicles moving in interstate commerce.

QUESTION PRESENTED

Whether, consistent with the constitutional guarantees of the Fourteenth and Sixth Amendments, a defendant, despite demands for information, can be required to stand trial on serious felony charges knowing essentially only the information provided by the form pleading of the government.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S.C., Const. Amend. VI.
U.S.C., Const. Amend. XIV.
18 U.S.C. Sec. 2313.
Rule 7(c), Federal Rules of Criminal Procedure.
Rule 7(f), Federal Rules of Criminal Procedure.
Rule 17.1, Federal Rules of Criminal Procedure.
(The foregoing amendments, statutes and rules are attached as Appendix E.)

STATEMENT

1. *Pre-trial Proceedings in the District Court.*

By a two-count indictment (Appendix C), the petitioner was charged with receiving two automobiles which allegedly had been stolen and were moving in interstate commerce. On October 6, 1966, the petitioner's attorneys filed a motion for bill of

particulars under Rule 7(f), Federal Rules of Criminal Procedure, setting forth twenty-two particulars concerning the alleged crimes (R. 9-11). The district court had power to grant, deny or grant in part such particulars under Rule 7(f). Each of the two counts of the indictment charged the defendant in the words of the statute and provided only the following information: (a) the approximate date of the offense, (b) the year, model and manufacturer of the vehicle, (c) the points between which the automobile was moving, and (d) that the receipt and concealment was within the State of Arizona. The indictment did not state (a) from whom the vehicle was received, (b) where it was received and concealed, and (c) whether either of the defendants had allegedly driven the motor vehicles involved. The motion for a bill of particulars (Appendix D) was denied as to all twenty-two of the particulars; the government in its response to particulars No. 21 and 22 stated that it knew of no material evidence favorable to the defendant. After denying the motion, the Court suggested that counsel informally confer with a view towards the government making more information available to the defendant. As a result of this conference, the petitioner additionally learned the place of receipt and concealment of the automobiles (Phoenix, Arizona), and the serial number, owner and color of each of the vehicles (R. 19-20).

Defense counsel asserted at the pretrial conference held five days before trial that they were unable because of lack of specificity to develop the defense of alibi or otherwise prepare an adequate defense (P.T. 2-3).*

Petitioner's counsel then offered to open their files upon the government doing likewise in accordance with Rule 17.1, Federal Rules of Criminal Procedure, and the suggestions of the Committee on Pretrial Procedure as set forth in 37 F.R.D. 95 (1965) (P.T. 5). The government refused (P.T. 5). The defendant then

*References to the trial transcript are shown as "T." and references to the pre-trial transcript as "P.T."

proceeded to trial knowing the information contained in the indictment, the serial number, owner and color of the vehicles, and the alleged place of receipt and concealment.

2. *The Trial.*

Although nine persons testified for the government at the trial, essentially defendant was convicted on the testimony of one person, Robert Menz, a convicted felon whose crimes included filing a false claim with the United States Government (T. 48). The defense had no knowledge of Menz's alleged role in the crime until he was called as a witness. Menz was never charged with the theft of either of the cars specified in the indictment (T. 49) and was cooperating with and acting at the suggestion of the Federal Bureau of Investigation (T. 58-60). The petitioner was found guilty by the jury and sentenced by the court to five years and fined $500 on each of the two counts, the sentences to run concurrently (R. 28).

3. *Proceedings in the Court of Appeals.*

An appeal was taken from the judgment and sentence thereon of the District Court upon the jury's verdict. The Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. Sec. 1291. The Court of Appeals in an unreported short opinion affirmed the judgment on the grounds that the granting or denial of a bill of particulars is largely a matter of discretion not to be overruled absent a showing of clear abuse. The petioner then filed for rehearing which was promptly denied without an opinion. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Because of the skeletal pleading of the indictment, denial of the motion for bill of particulars violated the petitioner's constitutional right to be informed of the nature and cause of the accusation; the proper interplay of Rules 7(c) and 7(f) is a question of major importance in the criminal law area and it needs definitive treatment by this Court.

ARGUMENT

I. *Because of the Skeleton Pleading of the Indictment, Denial of Motion for a Bill of Particulars Violated Petitioner's Constitutional Right to be Informed of the Nature and Cause of the Accusation.*

The issue presented by this case is whether, consistent with due process and the specific mandates of the Sixth Amendment, a defendant can be compelled to stand trial on a criminal charge armed only with the knowledge provided by the form pleading. The petitioner timely moved for a bill of particulars to flesh out the pleading skeleton. The motion was denied as to all the important particulars: from whom the cars were received, where the cars were concealed, whether the cars had been driven by the petitioner, and additional details as to time and place. The particulars sought are attached as Appendix D. Pleading that they were unable adequately to prepare their case because of the petitioner's insistence of innocence, defense counsel offered to open their files for mutual discovery as proposed by the Judicial Committee on Pretrial Procedure, 37 F.R.D. 95 (1965) (P.T. 5). The government refused the offer (P.T. 5).

The Court of Appeals ruled that the district court's denial of the motion for bill of particulars was a matter within the discretion of the trial court which would not be upset absent a "clear abuse of discretion." The case deals with the extent to which the government may file charges utilizing a brief form pleading, and then fail to provide the defendant, upon proper request, with the basic information regarding the offense charged. This is an important question upon which this Court should speak to clarify the appropriate tests and standards of one of the most important tools available to a criminal defendant. Further, this case squarely presents the proper interplay between the various federal rules; specifically, the relationship of Rule 7(c) and Rule 7(f).

The petitioner, along with his co-defendant, was charged (in typical barebones fashion) with the knowing receipt and conceal-

ment of two stolen motor vehicles, Appendix C. Each of the two counts of the indictment simply charged the petitioner in the words of the statute and provided as concrete information only the following: the approximate date of the offense, the year, model and manufacturer of the vehicle, the points between which the automobile was moving, and that the receipt and concealment was somewhere within the State of Arizona. Specifically omitted from the indictment was such basic information as from whom the vehicle was received, where it was received and concealed, and whether either of the defendants drove the motor vehicle. The trial court's failure to require the government to specify the exact dates and times involved precluded any efforts to develop an alibi: a time-honored and valid defense. No person, absent the most unusual circumstances (e.g. hospitalization), can specifically state where he was "on or about the 11th day of September, 1965" or "on or about the 18th day of October, 1965."

Given the modern day emphasis on statutory pleading, and the generalities allowed by Rule 7(c) of the Federal Rules of Criminal Procedure, the indictment was sufficient to withstand a motion to quash. However, as repeatedly noted by the federal courts, the rules must be read as a uniform whole; in this instance as a delicate counterbalancing of the rights of the petitioner under the inexorable command of the Sixth Amendment to be advised of the nature and cause of the accusation and the government's right not to be entangled in a web of pleading technicalities. Because we are dealing with a constitutional privilege, any statutory inroads are to be construed strictly. *Russell v. United States,* 369 U.S. 749, 82A S.Ct. 1038, 8 L.Ed.2d 240 (1962). This Court in *Russell,* discussing the protections afforded by an indictment, made it clear that the:

> ". . . basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, [as] is illustrated by many recent Federal decisions." (369 U.S. at 765-66, 82A S.Ct. at 1048).

However, the petitioner's quarrel is not with the indictment as such, but rather with the failure of the trial court to compel the government to disclose anything beyond the information contained in the indictment. The petitioner's request through a bill of particulars for basic information concerning the alleged offenses (R. 9-11) was specifically denied as to each particular requested. As a result of negotiation suggested by the trial court following denial, counsel for the petitioner additionally learned from the government that the alleged place of concealment was Phoenix, Arizona (a city encompassing approximately 187 square miles according to the Statistical Abstract of the United States, 1965), the serial number of each of the vehicles, and the parties in possession of the vehicles at the time of theft.

Beyond this, counsel for the petitioner was totally ignorant of the essential facts of the case until Robert Menz, a convicted perjurer (T. 48-49), testified as the government's third witness. Upon such short notice petitioner's counsel was totally unable to develop an effective cross-examination or impeaching material. There was simply no way for the petitioner to check out the witness's story as to dates, times and places. Nor, as already noted, did petitioner have any opportunity to establish the defense of alibi or inability. The case represents—in this supposedly enlightened day and age—a classic throwback to the era of "blind man's bluff" litigation. The refusal of the trial court to grant any aspect of the motion is particularly ironic, coming as it does in the heels of the amendment of Rule 7(f) "to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." (Advisory Committee on Criminal Rules Note to 1966 Amendment of Rule 7(f)).

Although the Court of Appeals suggested that defense counsel should have sought a continuance in the course of trial, this is not an adequate answer particularly since the witness Menz was an inmate of the federal prison, working closely with the Federal

Bureau of Investigation, and acting in his own self-interest. Menz was never charged with the theft of either of the automobiles and was clearly by his own testimony acting at the suggestion of agents of the Federal Bureau of Investigation. In any event, a defendant should not be subjected to the hazards of a continuance midway in trial. Rather, as the rules contemplate, a defendant should be permitted to use fully before trial the various procedures contemplated by the rules. At the very least, denial of the bill of particulars was an abuse of discretion.

Simply stated, it is the petitioner's position that the trial court abused its discretion by not making available to the petitioner before trial at least the rudimentary facts of the offenses. To state that this area is discretionary does not provide the answer unless the review function is to be abrogated totally. It is submitted that on these facts there can be only one conclusion: the trial court erred in not granting the motion for a bill of particulars. The government's hackneyed phrase in its motion in opposition to the motion for a bill of particulars, that is, that the material sought is "evidentiary" (R. 15), certainly is not a proper basis for the exercise of discretion; the particulars sought were very limited and restrained and truly pertinent to the allegations of the indictment. The government, sanctioned by the trial court, has simply adopted the advantages of notice pleading without accepting the requirements of disclosure imposed by the other sections of the Rules.

In *Lauer v. United States,* 320 F.2d 187 (7th Cir. 1963) the Seventh Circuit ruled that an indictment charging the sale of narcotics in violation of Sec. 4705(a), 26 U.S.C., was defective in that it did not set forth the name of the purchaser. The identity of the purchaser of narcotics in cases such as *Lauer* is completely analogous to the identity of the transferor of the automobiles in the instant case.

The *Lauer* decision has been criticized by the other courts of appeals, and was finally overturned by the Seventh Circuit itself

in *Collins v. Markley*, 346 F.2d 230 (7th Cir. 1965), *cert. denied*, 382 U.S. 946, 86 S.Ct. 408, 15 L.Ed2d 355 (1965). However, in distinguishing or refusing to follow *Lauer*, the various courts of appeals strongly emphasized not that the information should be withheld, but rather that the defendant should develop the facts through a bill of particulars rather than challenging the sufficiency of the indictment itself. It is fair to state that the reviewing courts simply assumed as a matter of course that the information would be supplied upon proper motion. *McDowell v. United States*, 330 F.2d 920 (10th Cir. 1964), *cert. denied*, 377 U.S. 1006, 84 S.Ct. 1944, 12 L.Ed.2d 1055 (1964) (no effort to procure the purchaser's name before trial); *United States v. Dickerson*, 337 F.2d 343 (6th Cir. 1964) (bill of particulars could have been used to give information as to identity).

By way of contrast, the petitioner in the present case not only filed a bill of particulars but also, pursuant to the suggestion of the Committee on Pretrial Procedure in 37 F.R.D. 95 (1965), offered at the pretrial to exchange files with the government (P.T. 2-5).

The district court (later Mr. Justice Whittaker), in a classic discussion, in *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954), emphasized the role of the bill of particulars in giving flesh to the pleading skeleton.

> "Certainly the fact that an indictment or information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7(f). Rule 7(f) necessarily presupposes an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish to the defendant *further information* respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial', and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature', and an accused is entitled to this 'as of right'.

* * *

"This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7(f) of the Federal Rules of Criminal Procedure.

* * *

"Nor is it any answer to a motion for bill of particulars for the government to say: 'The defendant knows what he did; and, therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty.* For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges'. This conclusion seems to me to be elementary, fundamental and inescapable." (citations omitted) (16 F.R.D. at 374-75).

This Court in *United States v. Debrow,* 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953), a perjury case, made precisely the same point:

"If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars." (346 U.S. at 378, 74 S.Ct. at 116).

The foregoing discussion, which could be continued at length, makes it clear that if the government wishes to adopt the convenience of notice pleading it may do so, provided, however, that it does not thereby jeopardize the defendant's constitutional right to know the nature and cause of the accusation against him. Petitioner submits that in this cause his right to be apprised under the Sixth Amendment has in fact been violated by the trial court's denial of even the simple matters inquired into by the bill of particulars. A contrary holding flies directly into the Committee's announced purpose in regard to the amendment of Rule 7(f): that the district courts henceforth view motions for bill of particulars more generously.

CONCLUSION

The failure of the government to provide the petitioner with the requested particulars violated his right to be apprised of the nature and cause of the accusation against him and accordingly violated his rights under the Sixth and Fourteenth Amendments. More importantly, the proper relationship of Rules 7(c) and 7(f), Federal Rules of Criminal Procedure, need clarification and explanation by this Court. These workaday tools have immense impact upon the practice of criminal law and, as being interpreted, they do not bestow upon defendants the full measure of their rights. For these reasons, therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
114 West Adams Street
Phoenix, Arizona 85003

April, 1968.

APPENDIX A

OPINION

Before: HAMLIN and DUNIWAY, Circuit Judges, and BOLDT, District Judge

HAMLIN, Circuit Judge

William Warden Duncan, appellant herein, was charged jointly with one Judson Wesley Rainey in an indictment filed in the United States District Court for the District of Arizona with two counts of violating 18 U.S.C. § 2312, which section makes unlawful the receipt and concealment of a stolen motor vehicle moving in interstate commerce knowing the motor vehicle to have been stolen. The two counts read as follows:

"COUNT I

"On or about the 11th day of September, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1961 Chevrolet Impala which was moving as interstate commerce from Los Angeles, State of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen.

"COUNT II

"On or about the 18th day of October, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1964 Chevrolet Impala Supersport which was moving as interstate commerce from Huntington Park, State of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen."

Before trial appellant filed a motion for a bill of particulars. In response thereto, appellee furnished certain information to appellant, and the district court thereafter denied appellant's motion. Prior to trial the district court granted appellant's motion for a separate trial.

Appellant, after a jury trial, was found guilty on both counts.

He filed a timely appeal to this court which has jurisdiction under 28 U.S.C. § 1291.

Upon appeal appellant makes two contentions: (1) That the court erred in denying his motion for a bill of particulars, and (2) that the court erred in failing to strike the testimony of Beverly Harrell.

We affirm.

By the indictment and by the information given to counsel for appellant he was advised of the date of each of the offenses, the place where the two automobiles were received and concealed, the serial numbers of the automobiles alleged to have been received and concealed, and the name of the owners of the automobiles at the time they were stolen. The make, year, model and color of the two automobiles in question were also furnished to appellant. The government produced a witness at trial who testified that he had delivered both automobiles to appellant and this witness was thoroughly cross-examined by appellant. At the time the court denied the motion for a bill of particulars, appellant's counsel reserved the right to move at the time of trial for the continuance in the event he did not have sufficient information to proceed with his defense. No such motion was made by appellant at the time of trial. No evidence was offered by the defense. The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense and enable him to prepare an adequate defense. *Remmer v. United States,* 205 F.2d 277 (9th Cir. 1953). The granting or denying of a bill of particulars is a matter within the discretion of the trial judge, and absent clear abuse of discretion will not constitute reversible error. *Cook v. United States,* 354 F.2d 529 (9th Cir. 1965). We find appellant was amply protected in this case and there was no abuse of discretion.

The witness Beverly Harrell testified to having seen in the possession of appellant in the "early fall" of 1965, a white Chevrolet of the year 1960, 1961 or 1962. She further testified that

she drove the car with permission of appellant and that it could be operated without a key.[1] We hold that the admission of this testimony was not error. Its weight was for the jury to determine.

Judgment affirmed.

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[1]The prosecution witness above referred to had also testified that the car delivered to appellant could be operated without a key.

APPENDIX B

"MAR 14 1968

"Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 21709 — WM. WARDEN DUNCAN v. USA was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Sincerely,

WM. B. LUCK,
Clerk."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, Defendant.	NO. C-17477 PHX. INDICTMENT Vio: 18 U.S.C. 2313 (Receiving and Concealing Stolen Motor Vehicle Moving in Interstate Transportation.)

THE GRAND JURY CHARGES:

COUNT I

On or about the 11th day of September, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1961 Chevrolet Impala which was moving as interstate commerce from Los Angeles, State of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen.

COUNT II

On or about the 18th day of October, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1964 Chevrolet Impala Supersport which was moving as interstate commerce from Huntington Park, State

of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen.

A TRUE BILL

/s/SANFORD H. HINTON
FOREMAN

WILLIAM P. COPPLE
United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, Defendant.	NO. C-17477-PCT. MOTION FOR BILL OF PARTICULARS (Oral Argument Requested)

William Warden Duncan, one of the defendants in the above entitled matter, moves the Court for an order requiring the Govenrment to furnish the said defendant, within a time therein specified, a written bill of particulars as to the following matters alleged in the Indictment herein, without which particulars the defendant is not effectively informed of the charges filed against him and cannot adequately prepare his defense. The movant requests the right to amend this motion after the government's bill of particulars is filed. Without knowing the precise charges against this defendant, it is impossible to state the exact items which may in the future be material to the preparation of his defense or give the reasons and grounds for their production.

1. From whom does the Government allege William Warden Duncan and Judson Wesley Rainey received the 1961 Chevrolet Impala as alleged in Count I?

2. Where does the Government claim that the 1961 Chevrolet Impala was concealed as alleged in Count I?

3. Is it contended by the Government that the defendant

William Warden Duncan drove the 1961 Chevrolet Impala referred to in Count I?

4. If the answer to question No. 3 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

5. Is it contended by the Government that the defendant Judson Wesley Rainey drove the 1961 Chevrolet Impala referred to in Count I?

6. If the answer to question No. 5 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

7. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1961 Chevrolet Impala as alleged in Count I?

8. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

9. If the answer to question No. 8 is "yes", set forth the name and address of the person so charged.

10. What is the serial number of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

11. From whom does the Govenrment allege William Warden Duncan and Judson Wesley Rainey received the 1964 Chevrolet Impala Supersport as alleged in Count II?

12. Where does the Government claim that the 1964 Chevrolet Impala Supersport was concealed as alleged in Count II?

13. Is it contended by the Government that the defendant William Warden Duncan drove the 1964 Chevrolet Impala Supersport referred to in Count II?

14. If the answer to question No. 13 above is "yes", set forth the date or dates on which such car was driven and the

places from which and to which the car was driven by the said defendant.

15. Is it contended by the government that the defendant Judson Wesley Rainey drove the 1964 Chevrolet Impala Supersport referred to in Count II?

16. If the anwser to question No. 15 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

17. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1964 Chevrolet Impala Supersport as alleged in Count II?

18. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

19. If the answer to question No. 18 is "yes", set forth the name and address of the person so charged.

20. What is the serial number of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

21. Does the Government know of or have in its possession evidence favorable to the defendant?

22. If the answer to question No. 21 above is "yes", set forth the nature of such evidence, its present location, and the name and address of all persons having or claiming to have information regarding such evidence.

Dated this 6th day of October, 1966.

LEWIS ROCA SCOVILLE
BEAUCHAMP & LINTON
By s/ Robert A. Jensen
Attorneys for Defendant Duncan
900 Title & Trust Building
Phoenix, Arizona 85003

[Memorandum of Points and Authorities Omitted]

Copy of the foregoing Motion
and Memorandum mailed this
6th day of October, 1966, to:

WILLIAM COPPLE, Esq.
United States Attorney
United States Court House
Phoenix, Arizona

s/ ROBERT A. JENSEN

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. U.S.C., Const. Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. U.S.C., Const. Amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 18 U.S.C. Sec. 2313:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicles or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4. Rule 7(c), Federal Rules of Criminal Procedure:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the

offense are unkown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omssion shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

5. Rule 7(f), Federal Rules of Criminal Procedure:

"The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such other later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires."

6. Rules 17.1, Federal Rules of Criminal Procedure:

"At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel."

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No. 1315

In the Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM WARREN DUNCAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
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Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a trial by jury in the United States District Court for the District of Arizona on the two counts of an indictment which charged that he received and concealed two different stolen motor vehicles moving in interstate commerce, in violation of 18 U.S.C. 2313.[1] On January 9, 1967, he was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and a $500 fine was imposed on each count. The court of appeals affirmed (Pet. App. A).

The sole issue raised by petitioner is whether the district court improperly denied a motion for a bill

[1] The case of Judson Rainey, who was also charged in the indictment, was severed, at petitioner's request, prior to trial.

of particulars filed under Rule 7(f), F.R. Crim. P. The indictment gave the date of each offense, described the automobile involved in count one as a 1961 Chevrolet Impala which was moving from Los Angeles, California, to Phoenix, Arizona, and the vehicle in count 2 as a 1964 Chevrolet Impala Supersport moving from Huntington Park, California to Pheonix. Prior to trial, petitioner filed a motion for a bill of particulars, seeking, *inter alia,* the name of the person from whom he allegedly received the vehicles, the serial numbers of the vehicles, and the specific place of alleged concealment (Pet. App. D). At a hearing on the motion, the trial judge refused to grant the motion, but encouraged counsel for the respective sides to confer with a view towards having the government make more information available to the defense (P.T. 2, 4–5).[2] Subsequently, petitioner's counsel was given the serial numbers and colors of the vehicles, the names of the owners and a more particularized description of the place of alleged receipt and concealment (1 R. 19).

Thereafter, at a pre-trial conference defense counsel offered to open his files to the government pursuant to Rule 17.1, if the government would do likewise. Counsel for the government declined the offer on the ground that revelation of the names of several witnesses might endanger their lives.

[2] "R." refers to the record in the court below; "P.T." refers to the transcript of the proceedings at the pre-trial conference; and "Tr." refers to the transcript of the trial proceedings, copies of which are on file with the Clerk of this Court.

At trial the government's chief witness was one Robert Menz who testified that he stole the cars involved in California and sold each of them to petitioner in Phoenix for $200 after petitioner had indicated he could use that type of car (Tr. 29–46).[3]

The claim that petitioner did not receive sufficient information to prepare his defense is without foundation. The indictment informed petitioner of the date of the offenses, the make of vehicles involved, and the route over which the vehicles were allegedly transported. In response to petitioner's motion for a bill of particulars, the government disclosed further the color and serial numbers of the vehicles, and their owners at the time they were stolen (see Pet. App. A, 13). Petitioner thus had sufficient information to be able to determine if he had in fact received the vehicles. Indeed, with that information he would know the one detail that was not formally revealed—the identity of the person from whom he received them. It is thus evident that petitioner was really seeking discovery of the government's evidence. Significantly, prior to trial petitioner specifically reserved the right to seek a continuance at trial if necessary to prepare an adequate defense. His failure to request such a continuance speaks for itself.

It is well settled that the purpose of Rule 7(f) is to require the disclosure of only those facts necessary to particularize the charge and prevent subse-

[3] One Vernon Hurst, who had earlier entered a plea of guilty to a related offense, testified that on his return from a trip in mid-October, he found the two cars in question parked in a lot near his residence (Tr. 72–77).

quent prosecution for the same offense. The rule does not require compulsory disclosure of the evidentiary details of the government's case. Moreover, the grant or denial of a motion for a bill of particulars rests within the sound discretion of the trial judge. See *Wilkins* v. *United States,* 376 F. 2d 552, 563 (C.A. 5), certiorari denied, 389 U.S. 964; *Ross* v. *United States,* 374 F. 2d 97, 103 (C.A. 8), certiorari denied, 389 U.S. 882; *Ray* v. *United States,* 367 F. 2d 258, 263 (C.A. 8), certiorari denied, 386 U.S. 913. As the court of appeals properly concluded, there was no abuse of that discretion here (see Pet. App. A, 13). Finally, petitioner was amply "informed of the nature and cause of the accusation" against him by virtue of all of the details brought to his counsel's attention. Thus, his contention that his Sixth Amendment rights were violated by the denial of his motion for a bill of particulars is without substance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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